

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 9, 2017

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2016AP518

Cir. Ct. No. 2015CV374

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

NANCY T. FITZGERALD,

PLAINTIFF-APPELLANT,

V.

KAREN CAPEZZA AND SECURA INSURANCE COMPANIES,

DEFENDANTS-RESPONDENTS,

UCARE MINNESOTA,

SUBROGATED PARTY.

APPEAL from a judgment of the circuit court for St. Croix County:
ERIC J. LUNDELL, Judge. *Affirmed.*

Before Stark, P.J., Hruz and Seidl, JJ.

¶1 PER CURIAM. Nancy Fitzgerald appeals a summary judgment dismissing her personal injury action against Karen Capezza and Secura Insurance

Companies. The circuit court concluded the claims were barred by the Worker's Compensation Act's exclusive remedy provision on the basis of co-employee immunity. We affirm.¹

¶2 This case arises from a single-vehicle accident that occurred while Fitzgerald was traveling to a work site in Iowa for All Star Catering, LLC, a business owned by Dean Homme. Fitzgerald was a passenger in a truck driven by Capezza, and, during a snowstorm, Capezza lost control of the truck causing an accident that resulted in injuries to Fitzgerald's neck. The truck was towing an enclosed trailer carrying All Star catering supplies. The truck was titled in Homme's name and insured by Secura.

¶3 Fitzgerald commenced a workers compensation proceeding in Minnesota, where the majority of All Star's catering business occurred. The matter was resolved through mediation with All Star's insurance carrier. The settlement agreement stated Fitzgerald was employed by All Star and her injuries "arose out of and in the course of her employment with the employer." An Assignment of Workers' Compensation Subrogation Interest Agreement stated, "Nancy Fitzgerald will not seek a recovery of any award or settlement amount from All Star Catering, Dean Homme or Karen Capezza personally regardless of the amount of the award or settlement by any insurer"

¶4 About a year after the worker's compensation matter resolved, Fitzgerald filed a personal injury action in St. Croix County circuit court against

¹ We note Capezza and Secura violate WIS. STAT. RULE 809.19(1)(i) (2015-16), requiring reference to the parties by name, rather than by party designation, throughout the argument section of their brief. All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

Capezza personally and Secura as the automobile insurer of the truck at issue. The circuit court granted a motion for summary judgment, concluding the matter was precluded by the exclusive remedy provisions of the Worker's Compensation Act. The court also concluded Fitzgerald had waived her claims against Capezza. Fitzgerald now appeals.

¶5 We review a grant of summary judgment using the same standards the circuit court applied in making its initial determination. *See Verdoljak v. Mosinee Paper Corp.*, 200 Wis. 2d 624, 630, 547 N.W.2d 602 (1996). Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show there is no issue as to any material fact and the moving party is entitled to judgment as a matter of law. WIS. STAT. § 802.08(2).

¶6 WISCONSIN STAT. § 102.03(2) establishes a general rule that worker's compensation is an employee's exclusive remedy against an employer, co-employees, and the worker's compensation insurance carrier, for a work-related injury. *See West Bend Mut. Ins. Co. v. Berger*, 192 Wis. 2d 743, 750, 531 N.W.2d 636 (Ct. App. 1995). Whether a claim is subject to the Worker's Compensation Act is a question of law we decide independently. *See Schactner v. DILHR*, 144 Wis. 2d 1, 4, 422 N.W.2d 906 (Ct. App. 1988), *overruled on other grounds by Byers v. LIRC*, 208 Wis. 2d 388, 561 N.W.2d 678 (1997). However, there is a strong public policy in favor of co-employee immunity, and we construe exceptions to statutory exclusivity narrowly. *See Hake v. Zimmerlee*, 178 Wis. 2d 417, 423, 504 N.W.2d 411 (Ct. App. 1993).

¶7 Fitzgerald argues the present lawsuit is not precluded by the Act because Capezza was an unpaid volunteer for All Star and therefore the

exclusivity provisions regarding co-employees do not come into play. Fitzgerald has acknowledged she was an “employee” and All Star was subject to the Act. If Fitzgerald and Capezza were co-employees of All Star, Fitzgerald was barred from bringing her action on the basis of co-employee immunity. To determine whether Capezza was an employee of All Star, we turn to the definition of “employee” under WIS. STAT. § 102.07(4)(a):

Every person in the service of another under any contract of hire, express or implied, all helpers and assistants of employees, whether paid by the employer or employee, if employed with the knowledge, actual or constructive, of the employer, including minors, who shall have the same power of contracting as adult employees

¶8 We conclude Fitzgerald and Capezza were co-employees. Fitzgerald and Capezza were driving together to an All Star event job site, pulling an All Star trailer with All Star catering equipment. All Star furnished the tools and equipment for the workers, including food and cooking supplies. All Star had the right to exercise control over the details of Capezza’s work, and it selected the locations of all of its events. All Star required Capezza to travel to Iowa the day before the event to ensure a smooth set-up. During the year of the accident, Capezza worked twenty different weekends for All Star. Capezza was not paid an hourly wage, but she received compensation such as paid expenses, food, lodging, and free admission into events. In this regard, the Act does not require a cash wage, and the element of payment may be anything of value.² See *Klusendorf Chevrolet-Buick, Inc. v. LIRC*, 110 Wis. 2d 328, 335, 328 N.W.2d 890 (Ct. App.

² Fitzgerald notes All Star’s owner, Dean Homme, testified at his deposition that he did not consider Capezza an employee. However, Homme’s lay opinion is irrelevant to the legal question whether an individual is an employee under the Act. See *Scholz v. Industrial Comm’n*, 267 Wis. 31, 39, 64 N.W.2d 204 (1954).

1982). We therefore conclude Capezza performed work that one might expect to be normally performed by an employee who was under a contract of hire and she meets the definition of employee under WIS. STAT. § 102.07(4)(a).

¶9 Fitzgerald insists the issue of whether Capezza was a co-employee at All Star “is simply one large question of disputed fact that rendered summary judgment inappropriate.” However, the relevant facts here are undisputed – indeed, Fitzgerald’s appellate briefs never articulate any particular relevant disputed question of fact – and we only address whether summary judgment was appropriate as a matter of law in light of WIS. STAT. § 102.03(2). Construction of a statute and its application to a set of facts presents a question of law. *See Minuteman, Inc. v. Alexander*, 147 Wis. 2d 842, 853, 434 N.W.2d 773 (1989). Furthermore, Fitzgerald ignores the strong public policy in favor of co-employee immunity and the narrow construction that we must apply to exceptions to statutory exclusivity.

¶10 In the alternative, Fitzgerald argues that even if Capezza was a co-employee, WIS. STAT. § 102.03(2) does not limit Fitzgerald’s right to bring an action against a co-employee for the negligent operation of a motor vehicle not owned or leased by the employer. Fitzgerald contends the truck was titled in Homme’s name, and there was no evidence All Star leased the vehicle from Homme or paid any lease payments to him.

¶11 Although the vehicle was titled in Homme’s name, the summary judgment submissions established All Star paid for the vehicle and paid all expenses related to its use. All Star also listed the vehicle on tax documents, registered it with the United States Department of Transportation as a commercial vehicle, and insured the vehicle as a commercial vehicle. Finally, at the time of

the accident, the vehicle was being used as a commercial vehicle for All Star's business. The circuit court therefore properly concluded the vehicle was owned by the employer.

¶12 Finally, Fitzgerald argues she did not waive her third-party claims against Capezza. However, Fitzgerald executed a legally binding agreement that stated, "Nancy Fitzgerald will not seek a recovery of any award or settlement amount from All Star Catering, Dean Homme or Karen Capezza personally regardless of the amount of the award or settlement by any insurer" We construe this unambiguous language according to its plain and ordinary meaning, without resort to extrinsic evidence. *See Town Bank v. City Real Estate Dev., LLC*, 2010 WI 134, ¶33, 330 Wis. 2d 340, 793 N.W.2d 476. As the circuit court correctly concluded, "It is clear that Fitzgerald promised that she would not personally sue Capezza. Fitzgerald did waive her third party claims against Capezza, therefore this claim is to be dismissed."

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. This opinion may not be cited under RULE 809.23(3)(b).

